

Board of Contract Appeals



April 19, 2004

GSBCA 16337-RELO

In the Matter of STEVEN FULLER

Steven Fuller, Albuquerque, NM, Claimant.

Rick Miller, Civilian Travel and Overseas Allowances, Compensation and Legislation Division, Office of the Chief of Staff, Department of the Air Force, Washington, DC, appearing for Department of the Air Force.

NEILL, Board Judge.

Claimant, Mr. Steven Fuller, is a civilian employee of the Air Force. In September 2003, he was issued orders transferring him to Kirkland Air Force Base (AFB) in New Mexico. Although an Air Force employee, Mr. Fuller, at the time of this transfer, was assigned to an overseas post at a Navy facility in Rota, Spain. While living in Spain, claimant and his wife had assumed temporary custody of two grandchildren. These were the children of Mr. and Mrs. Fuller's daughter, who was separated from her husband and, at that time, on active duty with the Air Force in Iraq.

Mr. Fuller's travel authorization provided for payment of travel expenses for himself and his dependents and for temporary quarters subsistence expenses. The authorization listed three dependents: claimant's wife and his two grandchildren. In calculating Mr. Fuller's allowance for temporary quarters and subsistence expenses incurred in Rota prior to departure, however, the agency refused to include the claimant's two grandchildren. As for the grandchildren's travel expenses, although these were originally authorized, the agency subsequently amended Mr. Fuller's travel authorization to delete the two children as dependents. The reason given for this deletion is that the grandchildren do not qualify as members of claimant's immediate family because Mr. Fuller is not their legal guardian.

Mr. Fuller disagrees with this determination and asks that we review it. On review of the record before us, we conclude that Mr. Fuller is not the legal guardian of the two children as that term should be interpreted in the applicable regulations.¹

¹ In his request that the Board review the agency's determination, Mr. Fuller points out that the position taken by the agency has implications not just for his grandchildren's return travel expenses and his temporary quarters subsistence allowance (TQSA) for expenses encountered

Background

Early in 2003, while still residing in Spain with Mr. Fuller, Mrs. Fuller decided to visit their daughter, who was serving in the Air Force at Luke AFB in Arizona. At the time of Mrs. Fuller's visit, her daughter was in the process of separating from her husband. Her visit also coincided with the entry of United States forces into Iraq and notification that her daughter would be deployed to Iraq in the very near future.

This news gave rise to an immediate problem concerning the care of the daughter's two children (ages four and seven). On April 7, 2003, claimant's daughter executed a special military power of attorney granting guardianship of her two children to her father, Steven Fuller. On April 22, 2003, Mr. and Mrs. Fuller's daughter executed an identical power of attorney, this time jointly with her separated husband, the father of her younger child.

Both powers of attorney bear the title "GUARDIANSHIP" and have the following preamble:

PREAMBLE: This is a MILITARY POWER OF ATTORNEY AND GUARDIANSHIP prepared pursuant to Title 10, United States Code §1044b, and executed by a person authorized to receive legal assistance from the military services. Federal law exempts this power of attorney from any requirement of form, substance, formality, or recording that is prescribed for powers of attorney by the laws of a state, the District of Columbia, or a territory, commonwealth, or possession of the United States. Federal law specifies that this power of attorney shall be given the same legal effect as a power of attorney prepared and executed in accordance with the laws of the jurisdiction where it is presented.

Both powers of attorney further provide that the power of attorney and guardianship will remain in full force and effect indefinitely, unless revoked by the principal(s).

In late April 2003, Mrs. Fuller returned to Rota with the two grandchildren. Mr. Fuller promptly applied for command sponsorship of his two grandchildren. The request was processed by the Navy since the base at Rota was under Navy command. In endorsing Mr. Fuller's request, the local Human Resources Office noted that this sponsorship would enable the children to reside in Spain and would entitle them to access to the base, the naval exchange, the base commissary, recreational facilities, and the base hospital (for a fee). The office also noted that command sponsorship would entitle the children to return transportation to the continental United States (CONUS). On June 20, 2003, Mr. Fuller's request for command sponsorship of the two grandchildren was approved.

before leaving his overseas post, but also for his living quarters allowance and his post allowance as well. Claimant's right to the latter two allowances is not a matter within our authority to decide. Donald E. Guenther, GSBCA 14032-RELO, 97-1 BCA ¶ 28,795. Our decision here, therefore, relates only to Mr. Fuller's claim for return travel expenses for his two grandchildren and for additional TQSA.

On September 11, 2003, the Air Force issued orders transferring claimant from the Naval base in Rota to Kirkland AFB. The orders authorized transportation and per diem for Mr. Fuller and three dependents. They also provided for payment of temporary quarters subsistence expenses on a fixed amount basis. On November 4, 2003, the Air Force amended Mr. Fuller's orders to delete the two grandchildren as dependents.

In issuing the amendment, the agency explained to Mr. Fuller that the office of the Judge Advocate had advised that the powers of attorney executed by his daughter did not create a "legal guardianship" as that term is used in Department of Defense (DoD) regulations to identify members of an employee's family entitled to relocation benefits. The agency explained that, because the term "legal guardianship" was not defined in the applicable regulations, agency counsel had turned to state law for guidance. The conclusion reached by counsel after reviewing the law of New Mexico (claimant's resident state) and the law of Arizona (his daughter's resident state) was that legal guardianship can be established only by a judicial determination. For this reason, the powers of attorney provided by claimant were not deemed sufficient to create a legal guardianship. Thus claimant's two grandchildren could not be considered members of his immediate family and thereby entitled to payment of travel costs and overseas allowances. The agency advised Mr. Fuller that he could request review of its decision by appeal to this Board.

In seeking our review of the agency's determination, Mr. Fuller asks us to bear in mind the distinction between temporary and permanent guardianship. It is his opinion that agency counsel has focused unduly on the requirements for permanent guardianship, as opposed to temporary guardianship for which his daughter has provided by executing the special military power of attorney and guardianship before leaving for Iraq.

Discussion

Mr. Fuller's Claim for His Grandchildren's Travel and Transportation Costs

Statute provides that an agency shall pay from government funds the travel expenses of an employee and the transportation expenses of the employee's immediate family when the employee is transferred in the interest of the Government from one official station or agency to another for permanent duty. 5 U.S.C. § 5724 (2000). It is left, however, to implementing regulations to define precisely who constitutes the employee's "immediate family." The Federal Travel Regulation (FTR) states that certain listed specific members of the employee's household at the time he or she reports for duty at the new permanent duty station constitute the employee's immediate family. Among those listed are the employee's spouse and children. The regulation further provides:

The term "children" shall include natural offspring; stepchildren; adopted children; grandchildren, legal minor wards or other dependent children who are under legal guardianship of the employee or employee's spouse; and an unborn child(ren) born and moved after the employee's effective date of transfer.

41 CFR 300-3.1 (2003) (FTR 300-3.1). DoD's Joint Travel Regulations (JTR), to which Mr. Fuller is subject as a civilian employee of the department, has a similar provision. JTR app.

A. In determining whether Mr. Fuller is entitled to payment of the travel and transportation costs of his two grandchildren, therefore, we must determine whether these children, at the time they traveled with their grandfather from Spain to New Mexico, were under his legal guardianship.

The Air Force, in an attempt to answer this question, has adopted an approach similar to that which we used in Joseph A. Soto, GSBCA 15023-RELO, 00-1 BCA ¶ 30,609. In that case, we were required to determine whether a power of attorney could create a legal guardianship for purposes of establishing entitlement to relocation benefits. Given the absence of a definition of the term "legal guardianship," as used in the FTR, we turned to applicable state law for guidance since domestic relations are generally controlled by that law. When neither the Board nor the claimant was able to find support in local law for the establishment of a formal guardianship through a power of attorney given to the claimant, we concluded that the power of attorney was not sufficient to establish a legal guardianship.

In this case, the state law to which we turn is that of Arizona. Arizona was the state in which the powers of attorney were executed and is also the state in which Mr. Fuller's grandchildren were living at the time the powers were executed.

Agency counsel has reviewed Arizona statutes for provisions relating to the guardianship of minors and has identified a provision dealing with their permanent guardianship. This provision requires specific action on the part of a court of competent jurisdiction and sets out several requirements which we need not discuss here other than to note that they clearly have not been met by the powers of attorney in this case. See Ariz. Rev. Stat. § 8-871 (2003).

Claimant recognizes that the authorizations given to him by his daughter are not permanent. He asks, therefore, that we bear in mind the distinction between temporary and permanent guardianship. With this request in mind, we have undertaken our own review of Arizona's statutes. We find that they do indeed speak of temporary guardianship. One statute, which deals with the formal appointment of a guardian for a minor, provides that, if necessary, the court may appoint a temporary guardian with the status of an ordinary guardian of a minor, but the authority of a temporary guardian shall not last longer than six months. Ariz. Rev. Stat. § 14-5207(c). This provision, of course, is of no use to claimant since it speaks of a temporary guardianship established by court order and for a duration of no more than six months -- as opposed to a temporary guardianship allegedly established by a parent's power of attorney of indefinite duration.

Another provision, more akin to the situation in this case, states that the parent or guardian of a minor or incapacitated person, by a properly executed power of attorney, may delegate to another person, for a period not exceeding six months, any powers that person may have regarding the care, custody, or property of a minor child or ward except for the power to consent to marriage or adoption of the minor. Ariz. Rev. Stat. § 14-5104. This provision, however, is hardly a match for the situation confronting us in the present case where Mr. Fuller's daughter, through a power of attorney, has transferred custody of her children to her father for an indefinite period of time. We also note that this statute does not refer to such an appointment as constituting guardianship. Indeed, we find it particularly significant that the author of a well known treatise on Arizona practice, in discussing this particular provision,

refers to it as a "non-guardianship arrangement." 5 Thomas A. Jacobs, *Arizona Juvenile Law and Practice* § 8.9 (2003). The obvious inference to be drawn from this comment is that the author of this treatise does not consider that, even under this statute, a true guardianship can be created merely through a properly executed power of attorney.

In short, Mr. Fuller has not provided us with anything to suggest that, under the laws of the state of Arizona, the temporary transfer of the care of a minor through the execution of a power of attorney constitutes a legal guardianship. Furthermore, the results of our own inquiry suggest that the opposite is true. In accordance with our practice of looking to applicable state law to determine whether children are under the legal guardianship of a transferred employee, we conclude that, in this case, Mr. Fuller's grandchildren were not under his legal guardianship and, as a consequence, were not part of his immediate family. The agency is correct, therefore, in stating that it erred in authorizing payment of the cost of the children's travel and transportation from Spain to New Mexico.

Does the fact that the powers of attorney in this case were military powers of attorney, prepared and executed pursuant to 10 U.S.C. §1044b, change our conclusion? We think not. It is true, of course, that powers executed under this statute are immune to challenge for failure to meet the requirements of form, substance, formality, or recording in state law. We are not concerned here, however, with the validity of those powers or even with their wording. Rather, our purpose in examining state law is solely to determine whether, under that law, the powers constitute "legal guardianship" as that term appears in the FTR and the JTR.

Finally, before passing on to a discussion of Mr. Fuller's claim for additional TQSA, we note that the claimant has submitted for our consideration a popularized explanation of the law of guardianship in the state of New Mexico, the state in which he now resides. It is his contention that New Mexico law recognizes that guardianship can be established by a parent quite apart from any formal court involvement. We appreciate the claimant's effort to research the issue of legal guardianship. Unfortunately, however, his reliance on New Mexico law is misplaced. As we have already pointed out, it is the law of Arizona and not the law of New Mexico which is relevant to the inquiry we have undertaken here. Regardless of whether Mr. Fuller's reading of New Mexico law is correct or incorrect, the law of that state has no bearing whatsoever on this case.²

² Although not specifically cited to us, we presume that the New Mexico statute which Mr. Fuller believes supports his argument is one found in section 45-5-202 of the New Mexico Statutes Annotated. It reads in part:

The parent of an unmarried minor may appoint a guardian for the minor by will, or other writing signed by the parent and attested by at least two witnesses.

N.M. Stat. Ann § 45-5-202 (Michie 2004).

Even if we were to look to New Mexico law to determine what constitutes legal guardianship under the FTR and the JTR, we believe it unlikely that this provision would support the conclusion that the powers of attorney in this case give rise to legal guardianship. The instruments signed by Mr. Fuller's daughter lack the attestation of the minimum of two

Mr. Fuller's Claim for TQSA for His Grandchildren

The allowance in dispute here is that to which Mr. Fuller believes he was entitled on the occasion of his vacating his quarters in Rota prior to departure for his new duty station in New Mexico. An agency may pay employees TQSA upon their arrival at or departure from an overseas post. The allowance is based on provisions of the Overseas Differentials and Allowances Act, which is codified in chapter 59 of title 5 of the United States Code. As we have previously noted, the purpose of that act was to improve and strengthen overseas activities of the Government by establishing a uniform system for compensating all government employees stationed overseas, regardless of the agency by which they were employed. The authority to promulgate regulations implementing this act is delegated to the Secretary of State. Mary M. Kay, GSBCA 15816-RELO, 03-1 BCA ¶ 32,061. These regulations are found in the Department of State Standardized Regulations (DSSR). DOD's JTR expressly state that TQSA rules for employees occupying temporary quarters after first arrival at a permanent duty station in a foreign area or immediately proceeding final departure are found in section 120 of the DSSR. JTR C1003.

This Board considers claims relating to TQSA to be within its authority under 31 U.S.C. § 3702(a)(3) to settle claims "involving expenses incurred by Federal civilian employees for official travel and transportation, and for relocation expenses incident to transfers of official duty station." Frederic S. Newman, Jr., GSBCA 15873-TRAV, 02-2 BCA ¶ 31,993; Michael J. Krell, GSBCA 13710-RELO, 98-2 BCA ¶ 30,050; Susan Drach, GSBCA 13863-RELO, 98-1 BCA ¶ 29,442 (1997). In resolving those claims, we look to the provisions of the DSSR, which have the force and effect of law. As such, we do not have the authority to waive, or carve out any exception to, the application of these regulations. Gordon D. Giffin, GSBCA 14425-RELO, 98-2 BCA ¶ 30,100.

Our task in adjudicating Mr. Fuller's claim for TQSA for his grandchildren is basically the same as that which we faced in examining his claim for the travel and transportation expenses for his grandchildren. We must determine whether the grandchildren can be considered dependents entitled to TQSA coverage. Because we are dealing with overseas TQSA, however, we look to the applicable DSSR provision rather than to the provisions found in the FTR and the JTR. In the definition section of the DSSR, we find a provision describing what constitutes the "family" of an employee. "Children" of the employee are defined as follows:

The term shall include, in addition to natural offspring, step and adopted children and those under legal guardianship of the employee or the spouse when such children are expected to be under such legal guardianship at least until they reach 21 years of age and when dependent upon and normally residing with the guardian.

witnesses. More importantly, other provisions in the statute quoted above indicate that the nominating instrument signed by the parent(s) and attested to by two witnesses must be far more than a mere power of attorney. This statute provides that the nomination (unlike a simple power of attorney) does not even become effective until filed in the court at the place where the minor resides or is present.

DSSR 040(m)(2).

Given this definition, we need not turn to state law to determine what is intended by the term "legal guardianship." On its face, it is clear that the regulation envisions permanent guardianship of the minor until he or she comes of age. Clearly the powers of attorney executed in this case by claimant's daughter giving temporary custody, revocable at will, of her children to her father fall short of this type of arrangement. The grandchildren cannot, therefore, be considered members of Mr. Fuller's family and thus entitled to share in his TQSA. The agency has acted correctly in stating that the allowance should be limited to claimant and his wife.

In asking that we review his claims, Mr. Fuller has touched upon the fact that some individuals in the Navy's Human Resources Office at Rota disagreed with officials in the Civilian Personnel Office at Ramstein Air Base in Germany on the matter of Mr. Fuller's right to TQSA for his grandchildren. The local Human Resources Office at Rota also was of the opinion that once command sponsorship was granted by the base commander, the grandchildren were entitled to return transportation to CONUS. Although Air Force officials were originally disposed to pay travel expenses, they ultimately amended Mr. Fuller's orders to delete mention of the two grandchildren as dependents. The claimant laments this apparent disagreement between personnel officials in the two services and goes so far as to state that he has been singled out for unfair treatment.

These are not matters in which we become involved. We are satisfied that the proper agency for these proceedings is the Air Force and not the Navy. It was the Air Force personnel office at Ramstein, not the Navy's office at Rota, which had the responsibility to provide administrative servicing to claimant. As to any possible equitable considerations which might lead the agency not to insist on the return of funds which may already have been advanced based upon an incorrect travel authorization -- these too are matters in which we do not become involved. Whether any debt should be waived or not is a matter committed by the Congress solely to the employee's agency. 5 U.S.C. § 5584. We have no authority to review DoD's determination as to waiver. See Stephen K. Magee, GSBCA 16342-RELO (Apr. 9, 2004).

Mr. Fuller's claims for TQSA and return travel costs for his two grandchildren are, therefore, denied.

EDWIN B. NEILL
Board Judge